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Supreme Court of the United States

October Term, 1942.

No. **851**

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JACK SHILKRET,

Respondent,

AGAINST

MUSICRAFT RECORDS, INC.,

Petitioner.

**Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Second Circuit, and Brief
in Support Thereof.**

MAURICE L. RABBINO,
Attorney for Petitioner.

CHARLES SNITOW,
ROBERT POMERANCE,
Of Counsel.



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Supreme Court of the United States

OCTOBER TERM—1942.

JACK SHILKRET,
Respondent,

AGAINST

MUSICRAFT RECORDS, INC.,
Petitioner.

No.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The undersigned, on behalf of the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on the 29th day of December, 1942, reversing the judgment of the District Court of the United States for the Southern District of New York, which dismissed the complaint of the respondent.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 29, 1942 (R. p. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 347).

Summary and Short Statement of the Matter Involved.

This is an action under the Copyright Act of 1909. The complaint alleged that the plaintiff composed a new arrangement of "Southern Roses Waltz" by Johann Strauss, and that the said composition, never having been printed or published, was forwarded to the Register of Copyrights, and a certificate under Entry Class E Unpublished was issued to the plaintiff pursuant to the provisions of Section 11 of the Copyright Act. The complaint further alleges that the defendant mechanically reproduced the said composition in the form of phonograph records and sold the recordings without the knowledge or consent of the plaintiff, and that this mechanical reproduction was an infringement of the plaintiff's copyright (R. pp. 3-11).

Defendant moved for an order under Rule 12 (b) of the Rules of Civil Procedure to dismiss the complaint on the ground that copyright protection is not extended to the holder of a copyright of an unpublished work registered under Section 11 against an alleged infringement by mechanical reproduction (R. p. 2).

Defendant's motion was granted, and the complaint was dismissed for failure to state a cause of action (R. pp. 20-21).

The District Court (per Leibell, *D. J.*) held that Section 1 (e) of the Copyright Act barred a Section 11 copyright owner from the exclusive right to the mechanical reproduction of his work since Section 1 (e) in express terms limited copyright protection in respect to mechanical reproduction to "compositions published and copyrighted after July 1, 1909" (R. pp. 12-19).

The Circuit Court reversed by a divided court, interpreting Section 1 (e) to include the holder of a Section 11 copyright (R. pp. 25-30).

The Questions Presented.

The questions presented are:

1. Whether Section 1 (e) of the Copyright Law in extending copyright protection to mechanical reproduction limits its application to published compositions.
2. Whether a work copyrighted under Section 11 has been published within the meaning of Section 1 (e).
3. Whether the holder of a copyright of an unpublished work under Section 11 is afforded any protection by the Copyright Law against alleged infringements by mechanical reproduction.

Reasons for Granting the Writ.

1. This case involves an important question of Federal law which has not been, but should be, decided by this Court. As Swan, *C. J.*, pointed out in the prevailing opinion, "This case presents an interesting question of first impression involving the interpretation of the Copyright Act of 1909" (R. p. 25).

2. The decision of the Circuit Court in this case has far-reaching consequences since it involves a determination of what protection is extended to the holder of a copyright under Section 11, particularly with respect to the increasingly important rights of mechanical reproduction. For the years 1938, 1939 and 1940, over 75,000 of such copyrights were filed with the Register of Copyrights. (Copyright Office, Catalog of Copyright Entries, Part 3, Musical Compositions.) They are all directly affected by this decision.

3. The decision of the Circuit Court in holding that a work copyrighted under Section 11 has been published, is in direct conflict with the framework and design of the

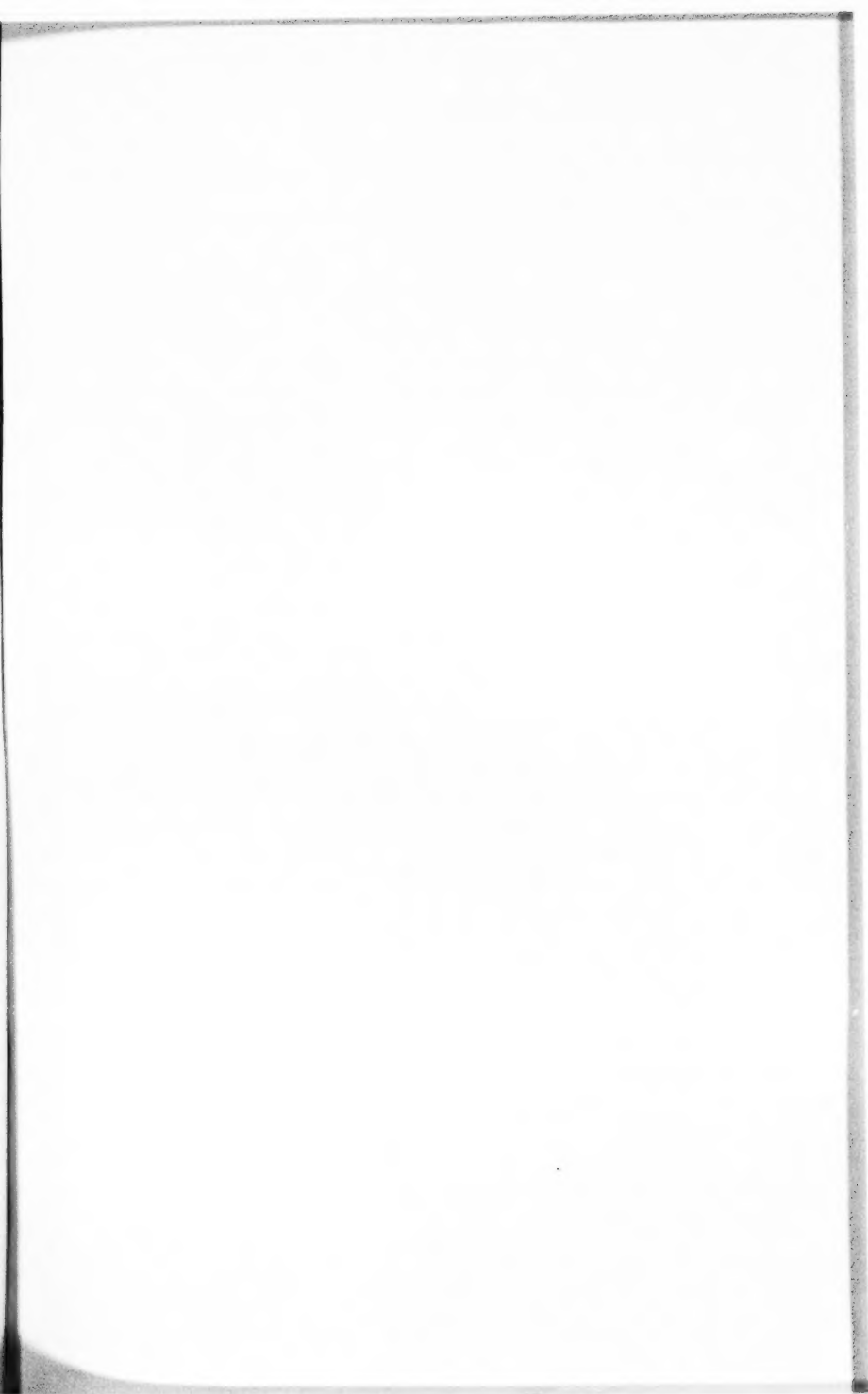
Copyright Law of 1909 and the Rules and Regulations for the Registration of Claims to Copyright. The distinction between published and unpublished works is part of the fundamental plan of the Copyright Act, and the procedure which is set forth in the Rules is based upon that distinction. The Circuit Court decision has to a great extent nullified that distinction with the anomalous result that an unpublished composition registered under Section 11 as an unpublished work and intended to be copyrighted as such, becomes by the mere act of deposit a published work.

4. The interpretation given the words "copyrighted and published" under Section 1 (e) of the Copyright Act conflicts with the interpretation given these words in *Patterson v. Century Productions Inc.*, 93 F. 2nd 489 (C. C. A. 2); *Joe Mittenhal v. Irving Berlin*, 291 F. 714 (D. C. S. D., N. Y.); *Leibowitz v. Columbia Graphophone Co.*, 298 F. 343 (D. C. S. D., N. Y.). In those cases a sharp and clear distinction between published and unpublished works is made. In view of these conflicting interpretations upon matters which affect the fundamental rights of copyright owners, a confusion evidenced by the fact that of the four judges who heard this case, two have decided one way and two the other, there should be a definite determination of this question by this Court.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York, March 22, 1943.

MAURICE L. RABBINO,
Attorney for Petitioner.





Supreme Court of the United States

OCTOBER TERM—1942.

JACK SHILKRET,
Respondent,

AGAINST

MUSICRAFT RECORDS, INC.,
Petitioner.

No.

Brief in Support of Petition.

Opinions Below.

The opinion in the Circuit Court of Appeals for the Second Circuit was filed on December 9, 1942 (per Swan, *C. J.*, concurred in by Learned Hand, *C. J.*, Chase, *C. J.*, dissenting) (R. pp. 25-30), and is reported in 131 Fed. (2nd) 929. The opinion of the District Court was filed on December 10, 1941 (per Leibell, *D. J.*) (R. pp. 12-19), and is reported in 43 F. Supp. 184.

Statement.

The relevant facts and the grounds upon which jurisdiction is invoked are set forth in the petition.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred:

1. In holding that mechanical reproduction rights are extended to the holder of a copyright registered under Section 11.

2. In holding that a work copyrighted under Section 11 has been published within the meaning of Section 1 (e) of the Copyright Act.

3. In holding that it was the intention of Congress that there be no distinction between published and unpublished works with regard to mechanical reproduction rights.

SUMMARY OF ARGUMENT.

POINT I.

The mechanical reproduction of unpublished compositions copyrighted under Section 11 does not constitute an infringement under the Copyright Act.

POINT II.

The copyright of a composition under section 11 does not constitute a publication thereof.

ARGUMENT.

POINT I.

The prevailing opinion of the Circuit Court in this case expressly recognizes that the Copyright Act of 1909 makes a definite distinction between published and unpublished works. Thus, at the outset, the Court states:

"The Copyright Act of 1909 recognizes a distinction between published and unpublished works of an author. Copyright of the former is obtained under §9, 17 U. S. C. A. §9, 'by publication thereof with the notice of copyright required by this title.' See *Washingtonian Co. v. Pearson*, 306 U. L. S. 30. Copyright of unpublished works, though not described by that term, is dealt with in Section 11, 17 U. S. C. A. §11. So far as now relevant, Section 11 reads as follows:

"Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a * * * musical * * * composition; * * *. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under Sections 12 and 13 of this title, where the work is later reproduced in copies for sale" (R. p. 26).

It is conceded that the plaintiff in his complaint claimed a copyright under Section 11, that his work was unpublished, and that the allegations of infringement are confined to his alleged mechanical reproduction rights.

The sole provision in the Copyright Act for protection of mechanical reproduction rights is contained in Section 1, Subdivision (e) of the Copyright Act. It is there provided in part:

"Section 1. (Exclusive rights in copyrighted works.) That any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: * * *

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for

the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided, that the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909 * * *.*" (Italics the writer's.)

Section 1 (e) in extending copyright protection to mechanical reproductions thus expressly limits such protection to published compositions and no protection whatever is extended to holders of copyrights of unpublished works against alleged infringement by mechanical reproduction.

Prior to the enactment of the Copyright Act of 1909, the law as declared by the Supreme Court of the United States in *White-Smith Music Pub. Co. v. Apollo*, 209 U. S. 1, 52 L. Ed. 655 (1908), was that mechanical contrivances were not written or intelligible copies of a copyrighted work and therefore mechanical reproduction did not constitute an infringement.

The Copyright Act of 1909 by Section 1 (e) for the first time extended some protection to mechanical reproduction rights. But the protection given by Section 1 (e) is strictly limited to works which have been both published and copyrighted. Amdur, in his work on copyright law, substantiates this position. It is there stated:

"It would seem that mechanical reproduction rights apply only to musical compositions which have been published, since the Section states that the mechanical reproduction provisions of the Act

'shall include only compositions published and copyrighted after this Act goes into effect'." (Leon H. Amdur, Copyright Law and Practice, Clark Boardman Co., 1936 Ed., N. Y., p. 326.)

That the terms of Section 1 (e) would bar the plaintiff from recovery is recognized by the Circuit Court, which states:

"Read literally, the quoted phrase does seem to limit the right to compositions which are both published and copyrighted after July 1st" (R. p. 27).

In order to avoid the clear purport of the statute, however, the Circuit Court embarks on a journey into the nebulous fields of Congressional intent and concludes that when the legislature said "published and copyrighted" its terminology was "inept for copyrights of unpublished works" (R. p. 29) and that Congress meant not what it said, but what the Circuit Court believed it should have said.

Yet Judge Learned Hand, who concurred in the prevailing opinion, previously came to a contrary conclusion in deciding a similar question, holding that the court was not justified in construing the word "published" as equivalent to "copyrighted" even though that may have been a possible intent. In *Leibowitz v. Columbia Graphophone Co.*, 298 F. 342, involving the interpretation of Section 8 of the Act, Judge Hand said:

"The musical composition at bar has never been published at all; on the contrary, it was copyrighted as an unpublished work under Section 11. Literally, at least, the plaintiff does not fall within Section 8 (a) even if it applies to this kind of copyright at all. *I do not feel justified in extending the language 'at the time of the first publication'. To*

serve the plaintiff, it must be read as equivalent to 'at the time of acquiring the copyright.' Possibly that was the purpose, but the act recognizes expressly in Section 11 copyright in an unpublished work, so that the two are not synonymous.

It is always unsafe to attribute a given intent to Congress. Yet it may be that, as respects such copyrights, the benefits of the statute were extended to domiciled aliens only on condition of their reproducing copies for sale. Since it is publication which at common law defeats an author's common law literary rights, it is conceivable that it was thought proper to leave domiciled aliens who would not publish to such common law rights." (Italics the writer's.)

Similarly in the present case, the words "published and copyrighted" cannot be construed as equivalent to "copyrighted". To follow the reasoning of Judge Learned Hand, it may well be that as respects copyrights under Section 11, the benefits of the statute with respect to mechanical reproduction were to be extended only on condition that the copyright owner publish his work, and it was thought proper to leave copyright owners who would not publish to whatever common law rights they might have.

This interpretation is fortified by the Act itself. Section 2, which immediately follows Section 1 (e) provides that the rights of the owner of an unpublished work should not be annulled or limited by the provisions of the Copyright Act. Thus, Congress recognized that the owner of an unpublished work had certain rights different and distinguishable from those extended to the owner of a published work by the Copyright Act. Section 1 (e) in referring to mechanical reproduction rights has also set up certain arbitrary royalty payments and licensing provisions together with requirements with respect to filing

additional notices. These provisions with respect to mechanical reproduction rights have no counterpart in the Act. "Mechanical rights were treated as illegitimates, cared for by their natural parent—but never acknowledged" (Shafter, *Musical Copyright* 2nd Ed., p. 332).

In discussing the words "published and copyrighted" and the Congressional intent, the District Court said:

"To construe the proviso clause of Section 1, subd. (e) to conform to plaintiff's contention would require the elimination of the words 'published and' from the wording of the statute and leave only the word 'copyrighted'. The conjunction used is the word 'and', which connects the words 'published' and 'copyrighted'; it is not the word 'or' separating two alternatives. Of course, the proviso indicates clearly that it was not to be retroactive in its effect. It was intended that it 'should include only compositions published and copyrighted after the Act became effective on July 1, 1909.' *M. Witmark & Sons v. Standard Music Roll Co.*, 221 Fed. 376. See, also, 18 C. J. S., Sec. 118 (c). But that was not the sole purpose of the proviso, as I read it. It applied prospectively only to such musical compositions as were both published and copyrighted after July 1, 1909. If Congress had intended what plaintiff claims it did intend, the Congress would have used only the word 'copyrighted' " (R. pp. 18-19).

If courts can thus disagree as to a Congressional intent, then surely the express words of the statute should be permitted to govern. If the Circuit Court believed that it was desirable to extend mechanical reproduction rights to the holder of an unpublished copyright, then the remedy lies in amendment of the statute.

As this Court pointed out in *White-Smith Music Pub. Co. v. Apollo*, *supra*:

"Such considerations properly address themselves to the legislative and not the judicial branch of the government" (p. 18).

POINT II.

The copyright of a composition under Section 11 does not constitute a publication thereof.

To justify the conclusion that a composition copyrighted under Section 11 is given mechanical reproduction rights, the Circuit Court has been compelled to hold that a work copyrighted under that section has been "published". It is admitted that in order so to construe the word "we have to give it a meaning more limited than is ordinarily accorded it" (R. p. 29).

To say that a deposit of a copy of an unpublished work with the Copyright Office for registration under Section 11 constitutes a publication thereof leads to the absurd conclusion that an unpublished work intended to be copyrighted as such is transformed into a published work by the mere act of deposit. To state the proposition is to demonstrate its fallacy. If this contention be true, then the distinction in the Copyright Act and the Rules between published and unpublished works is completely nullified. There is then no necessity for the distinction between published and unpublished works set forth in Rule 19, nor for the provisions of Section 11 and Rule 23 providing for subsequent registration if the work is later published. The distinction between copyright under Sections 9, 12 and 13 on the one hand, and Section 11 on the other, is abrogated. The decision of the Circuit Court in this regard is contrary to a long line of decisions which have recognized the distinction between published and unpublished works. Thus in the case of *Patterson v. Century Productions Inc.*, 93 Fed. 2nd 489, the Court said:

" * * * as the plaintiff did in the first instance comply with Section 11, his copyright so obtained was valid for an unpublished motion picture not a photoplay provided the work was unpublished. So long as it remained unpublished, he was not required to do more to keep his copyright valid for the statutory period.

But, if a work so copyrighted is later published, continued validity and the right to maintain a suit for infringement is dependent upon compliance with the statute and rules made under the authority of the statute applicable to the change in the status of the work which publication makes."

Amdur in his *Copyright Law and Practice* states:

"Statutory copyright may be acquired in unpublished works, *i. e.*, of which copies are not reproduced for sale or distribution. There is, of course, no publication; copyright is secured by registration (and differs fundamentally from the copyrighting of published works, which is secured merely by publication with notice.) * * * " (p. 439).

Shafter in his *Musical Copyright* states:

"Some composers may imagine that deposit with the copyright office is sufficient publication. This is not so. At the present time, some act of publication must exist in addition to the fact of deposit." (Shafter, *Musical Copyright*, 1939, 2d Ed., p. 94.)

The case of *Marks v. United States*, 96 Fed. 2nd 204 (C. C. A. 9) extensively cited by the Circuit Court in support of its conclusion involves the question whether the term of an unpublished copyright is limited. If the term

of this type of copyright were unlimited, the provisions with respect thereto would be unconstitutional in view of the constitutional provisions with respect to the limitation of the term of copyrights. The court stated the principle that legislative enactments must be construed if possible as constitutional and that the long acquiescence in the constitutionality of the copyright statute created a strong presumption in its favor. Although no definite term was fixed in the Act for unpublished copyrights, Section 60 of the Act provided that no manuscript of an unpublished work should be destroyed during its term of copyright without specific notice to the copyright owner. The Act therefore indicated "a declared purpose to limit all copyrights" (p. 206). The court therefore felt justified in supplying the omission in the Act by holding that the copyright should run twenty-eight years from the date of deposit. This is far from a holding that deposit is equivalent to publication or that the word "published" is equivalent to "copyright". If publication were equivalent to deposit, the extensive discussion in the *Marks* case with respect to constitutionality and intent of Congress would all have been unnecessary. It is submitted that the decision in the *Marks* case is no authority for the conclusion reached by the Circuit Court in this case.

In the cases of *Stern v. Remick*, 175 Fed. 282 (S. D. N. Y. 1910) and *Cardinal Films Corp. v. Beck et al.*, 248 Fed. 368 (S. D. N. Y. 1918), there are indications that a deposit of two copies of the work in the Library of Congress pursuant to Sections 9 and 12 constituted sufficient publication. These cases have no relevancy to the situation where the author is seeking a copyright for an unpublished work under Section 11. In any event, the authority of these cases has been questioned in the later case of *Joe Mittenenthal Inc. v. Irving Berlin Inc.*, 291 Fed. 714 (S. D. N. Y. 1923). The court there stated (per L. Hand, *D. J.*):

"*Stern v. Remick* was rightfully decided because there had been a sale, but I must own that what I said there of publication seems to me now open to doubt" (p. 715).

The court also states that the *Cardinal Films Corp. v. Beck* case, *supra*, followed the ruling in the *Remick* case, and therefore, had no independent standing of its own. It may, therefore, be concluded that even under Sections 12 and 13 of the Act the deposit of two copies with the Copyright Office does not constitute a publication.

It is respectfully submitted that the Circuit Court erred in construing the Act to make a work copyrighted under Section 11 published within the purview of Section 1 (e). This decision to a great extent eradicates the difference between published and unpublished works in derogation of the very structure of the Act and the Rules, and it is contrary to and adds further confusion to previous decisions of the courts.

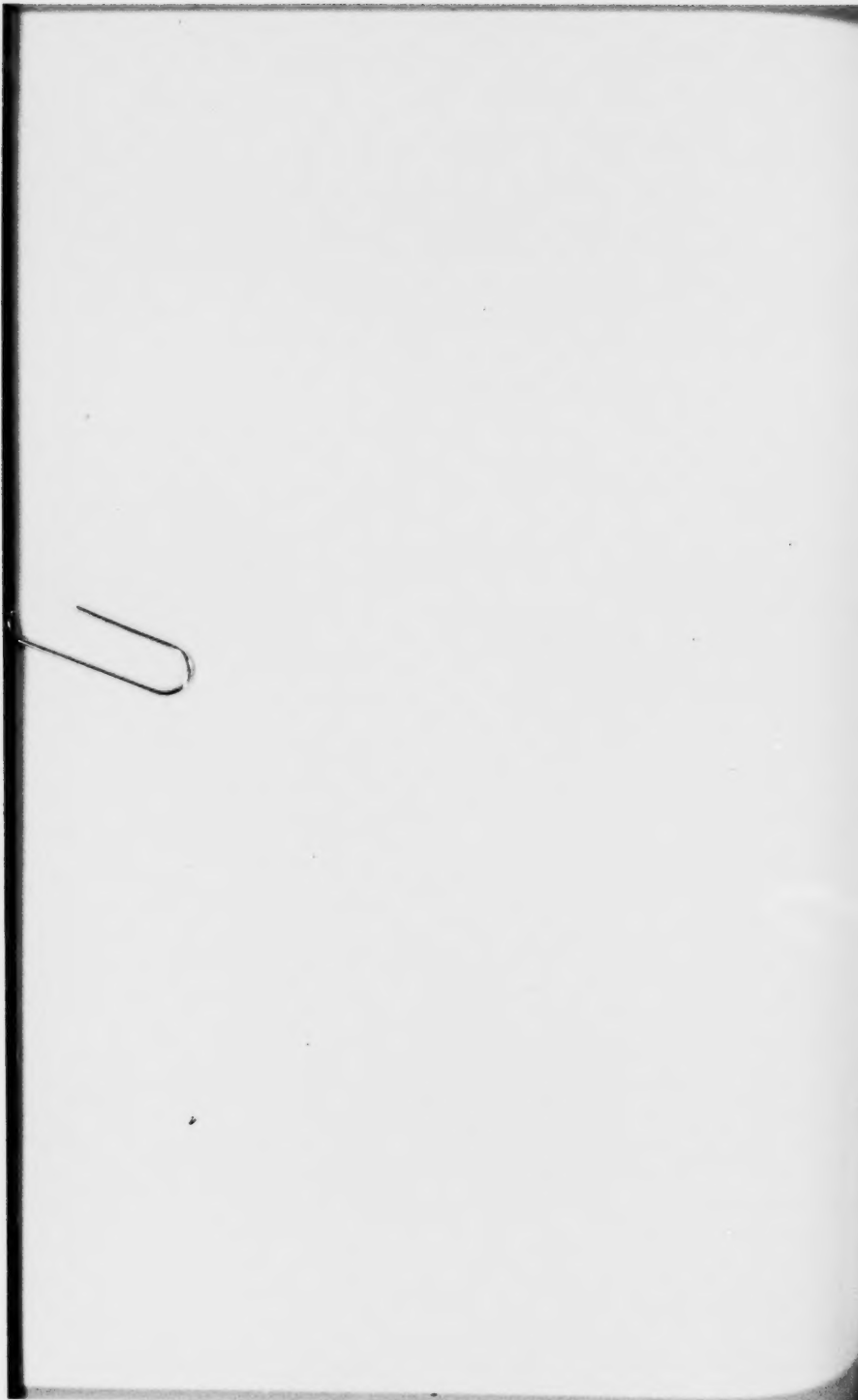
Conclusion.

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

MAURICE L. RABBINO,
Attorney for Petitioner.

CHARLES SNITOW,
ROBERT POMERANCE,
Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1942.

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JACK SHILKRET,

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Petitioner.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.**

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion in the Circuit Court of Appeals for the Second Circuit is reported in 131 Fed. (2nd) 929 (R., pp. 25-30). The opinion in the District Court is reported in 43 F. Supp. 184.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered December 29th, 1942. The petition for a writ of certiorari was filed March 25th, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 347).

Question Presented.

Whether a work copyrighted under Section 11 of the Copyright Law (U. S. C. A., Title 17) and not reproduced in copies for sale is entitled to the protection in respect of mechanical royalties concededly accorded to works published and copyrighted after July 1, 1909.

Statutes Involved.

The pertinent provisions of the Copyright Law appear in the brief.

Statement.

This is an action under the Copyright Law of 1909. The complaint alleges that the respondent composed a new arrangement of "Southern Roses Waltz" by Johann Strauss and that the said arrangement was registered under Section 11 of the Copyright Act of 1909, as amended, and that a copyright issued to the respondent in said work. The complaint further alleges the petitioner caused the said work to be recorded mechanically and that such mechanical recordation was an infringement of respondent's copyright (R., pp. 3-11).

Petitioner moved under Rule 12 (b) F. R. C. P. to dismiss the complaint contending that an unauthorized mechanical recordation of a work copyrighted under Section 11 of the Copyright Act, as amended, does not constitute copyright infringement (R., p. 2). Petitioner's motion was granted by the District Court which dismissed the complaint for failure to state a cause of action (R., pp. 20-21). The Circuit Court of Appeals for the Second Circuit reversed the lower court's decision (R., pp. 25-30).

Argument.

Deposit of a work not reproduced for sale in the Library of Congress to effectuate a copyright under Section 11 of the Act (U. S. C. A. Title 17) is a publication of the work.

Section 11 of the Copyright Act states:

“That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work, if it be a * * * musical * * * composition * * *. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under Sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale.”

The basis of the petition for a writ of certiorari in this matter is the contention that a work copyrighted under Section 11 *supra* (it is not claimed the copyright was secured prior to July 1, 1909) is a copyright in an “unpublished” work and is therefore not protected under Section 1 (e)¹ of the Act which

¹ “Section 1. (Exclusive Rights in copyrighted works.) That any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced; PROVIDED, that the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909 * * *.”

accords protection for mechanical recordings of copyrighted works. It should be noted that "publication" of a work may take many forms other than the sale of copies to the public. It is the latter type of publication which is specifically differentiated by Section 11.

In Section 11, *supra*, no mention is made of "unpublished" or "published" works but the Section and the entire Act, in fact, was enacted to promote the arts and to grant copyright protection to one who registers a manuscript in the Library of Congress open to the inspection of the public.

The Copyright Act of 1909 fixed only one method of securing copyright,—publication with notice of copyright as differentiated from the old law which required the deposit of copies prior to the grant of a copyright.²

What a "publication" is and what constitutes sufficient publication to secure a copyright under the Copyright Act of 1909, as amended, has been determined many times by our Courts.

A publication is a disclosure of a work to the public, a notification to the people at large by writing.³

The test of "publication" is a determination of whether

" * * * the delivery assured that the public, or an indefinite portion of it, should, without further

² *Washingtonian Pub. Co., Inc. v. Pearson et al.*, 306 U. S. 30, 59 S. Ct. 397 (1939); Weil, "Copyright Law", 1917, p. 270; Committee Report on Bill Enacting Copyright Law of 1909, 60th Congress, 2nd Sess. #2222 states in discussing Section 9 of the Act: "It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice, and the other formalities become conditions subsequent."

³ Webster's Universal Dictionary (1936), Volume 2.

action on the part of the author, have access to it."⁴

The Copyright Act, Section 58, expressly provides that

"all works deposited and retained in the Copyright Office shall be open to public inspection."

The view that deposit of a work in a public office is a publication, and deposit of a work in the Library of Congress to effectuate copyright constitutes a publication of the work, has been considered and approved by the Courts and authorities. In *Stern et al. v. Jerome H. Remick & Co.*, 175 Fed. 282 (1910), at page 284, the Court, referring to what constitutes a publication, stated:

"Certainly, under this language, either the deposit, or the sale of the single copy to Ditson, was a publication"

and 18 C. J. S. 190, Sec. 66, in discussing what constitutes publication under the Act, says:

"The deposit of copies of the work in the office of the librarian of Congress is a sufficient publication * * *."

In *Patterson v. Century Productions, Inc., et al.*, 93 F. (2d) 489 (1937), the Court, approving the decisions in *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577, and *Cardinal Film Corp. v. Beck et al.*, 248 Fed. 368, stated at page 491:

"No publication was necessary other than the

⁴*Ladd v. Ornard*, 75 Fed. 703, at pages 730, 731; see also *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, 155 N. Y. 241; *Weil*, supra, page 150, #387.

deposit required by the statute as a prerequisite to validity."

Weil, in *Law of Copyright*, page 303, Section 780, states:

"It is deemed, however, that under a proper reading of the language of this section (17 U. S. C. A., 11) it may well be held that the publication requisite may be contemporaneous with registration, that is to say, that the deposit of the prescribed copy in the Copyright Office is sufficient publication and that, if there has been no prior publication, the copyright will date from the time of deposit of the copy."⁵

In the case of *Marx et al. v. United States*, 96 Fed. (2d) 204 (1938), C. C. A. 9, the Court found no difficulty in determining that a work not reproduced in copies for sale is published within the Act and in determining the date of such publication. The Court, in a well reasoned opinion by Circuit Judge Healey, concluded that the Copyright Act limited all copyright to 28 years with a renewal for 28 more years and that under Section 23 of the Act,⁶ the date of the first publication of the works, of which copies are not reproduced for sale, is the date of deposit in the Copyright Office.

The intent of Congress in granting mechanical protection to copyrighted works under Section 1 (e),

⁵ See also *Ladd v. Ornard*, *supra*; *Collaghan v. Myers*, 128 U. S. 617, *Weil, supra*, pages 292, 293, #774, also, page 128, #324, and cases cited; Howell, "The Copyright Law", page 105

⁶ 17 U. S. C. A. Section 23:

"That the copyright secured by this title shall endure for twenty-eight years from the date of first publication * * *"

supra, of the Copyright Law of 1909 is clear and to give full meaning to the proviso contained therein one must look to the many Congressional hearings held before the Copyright Law of 1909 was enacted.

The case of *White-Smith Music Publishing Company v. Apollo*, 209 U. S. 1, decided February 1908, was in progress of litigation during the hearings which commenced in 1906. In that case the Supreme Court of the United States, construing the Copyright Act of March 3, 1891, held that mechanical reproduction was not one of the rights which flowed from the limited monopoly granted to creators of copyrighted works. Section 1 (e) was inserted in the Copyright Act to remedy this omission, yet the petitioner now claims that the purpose and intent of Congress was not achieved and should be defeated.

The sole reason for insertion of the phrase “* * * published and copyrighted after July 1, 1909 * * *” (the effective date of the Act) in Section 1 (e) was to stress the non-retroactivity of the rights granted to copyright owners.⁷

⁷ 17 U. S. C. A. Section 1 (e). Although the Committee Report on the Copyright Act, Committee Report on Bill Enacting Copyright Law of 1909, 60th Congress, 2nd Session, #2222 does not discuss the retroactivity of the proviso, at the Hearings before the Committee on Patents of House of Representatives conjointly with the Senate Committee on Patents on H. R. 19853, June 6, 7, 8 and 9, 1906 at page 96, the following colloquy between Nathan Burkan, Esq., and Chairman Currier of the House of Representatives' Committee and Representative Chaney:

“Mr. Currier: I do not think you need spend much time in talking about subsisting copyrights.

“Mr. Burkan: The intent of this act is to make it apply to compositions copyrighted after this act goes into effect.
* * *

“Mr. Chaney: It can be readily modified to suit that

[Footnote continued on following page.]

The Circuit Court, speaking through Swan, *Cir. J.*, states (R., p. 28):

“No intelligible reason can be suggested why Congress should wish to forbid mechanical reproducers to infringe copyrighted works which had been published, but allow them to copy those which had not.”

The soundness of this view is questioned but not answered by petitioner, who dismisses this equitable and entirely logical conclusion by terming it “a journey into the nebulous fields of Congressional intent * * *” (Pet.’s Brief, p. 9).

The Supreme Court of the United States, in the case of *Harrison v. Northern Trust Co. et al.*, 63 S. Ct. 361, decided January 11, 1943, said at page 363:

“But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on ‘superficial examination.’” *United States v. Trucking Ass’n*, 310 U. S. 534, 543, 544, 60 S. Ct.

[Footnote continued from preceding page.]

(only to composition copyrighted after this act goes into effect). There is not any question that we do not want to make it retroactive.”

See also pages 100, 101 of the Hearings for colloquy between Mr. Davis and Representative Webb. No limitation was discussed against so-called “unpublished” works, but all references as to protection to be granted by the action 1 (e) are to “copyrighted” works. See also Committee Report #2222, *supra*, under Section 1 (e) of the Act in which the Committee refers time and time again to the protection to be granted to composers and copyright owners of “copyrighted” works.

1059, 1063, 1064, 84 L. Ed. 1345." (See *United States v. Trucking Ass'ns*, *supra*, 310 U. S. 534 at pp. 543, 544 and cases cited therein.)

The further characterization by petitioner of the decision of the Circuit Court as being an interpretation not of what Congress meant but what the Circuit Court believed it should have said is comprehensible only when one realizes that even the petitioner can not divine any reason why less protection should be accorded to a copyright secured under Section 11 than that for one granted under Section 12.

The construction of the Copyright Law desired by petitioner would create the first distinction, by any Copyright Act of any Country, between the rights granted to statutory copyrights. The true intent of Congress in enacting the Copyright Act of 1909, including Section 1(e) was to dispense with the inequalities and inequities which arose under the previous Copyright Acts with the result that copyright owners and writers received no compensation whatsoever for mechanical recordings of their creations. The Committee Hearings, of which at least 60% relate to arguments concerning mechanical recordings under the Act, definitely show an intent to protect each and every copyright owner under the Act and no distinction is made at any time in the hearings or in the Committee Report #2222, *supra*, between copyrights in works reproduced for sale and in works not reproduced for sale.

Reference is made (Pet.'s Brief, p. 10) to Section 2 of the Copyright Act and its application to unpublished works. It is elementary that Section 2 refers to common law copyrights only and that after the

receipt of a statutory copyright, he is under Section 11 or Section 12, one secures his rights and remedies only under the Copyright Act.

CONCLUSION.

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted,

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Attorney for Respondent.

